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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 223

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION ET AL., APPELLANTS

v.

THE BALTIMORE AND OHIO RAILROAD COMPANY ET AL.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

OPINION BELOW

The opinion of the district court (R. 148–152) is reported at 71 F. Supp. 499. The report of the Interstate Commerce Commission (R. 28–50) appears at 266 I. C. C. 55.

JURISDICTION

The final judgment of the three-judge district court was entered on May 14, 1947 (R. 190). The petition for appeal was presented and allowed on July 11, 1947 (R. 191–192). The jurisdiction of this Court is invoked under Section 210 of the Judicial Code, as amended by the Urgent De-

ficiencies Act of October 22, 1913 (28 U. S. C. 47a), and under Section 238 of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. 345). Probable jurisdiction was noted on October 13, 1947 (R. 619).

QUESTIONS PRESENTED

1. Whether a common carrier by rail can relieve itself of the obligations imposed by the Interstate Commerce Act on such a carrier by entering into an agreement with a non-carrier for restricted and discriminatory operation over a portion of track owned by the non-carrier but maintained and operated by the carrier, which portion of track is essential to reach several industries dependent on the carrier for rail service.

2. Whether the common carrier by rail and the non-carrier can, by making such an agreement, oust the Interstate Commerce Commission of jurisdiction to require the rendering of non-discriminatory rail service over the track in question to the industries concerned.

STATUTES INVOLVED

The pertinent provisions of the Interstate Commerce Act and of the Elkins Act are set out in Appendix A, *infra*, pp. 77–90.

STATEMENT

This is an appeal from a judgment setting aside an order of the Interstate Commerce Commission. The facts found by the Commission, which are not

in dispute (R. 148), may be summarized as follows:

At Cleveland, Ohio, the packing plant of the appellant Swift & Company (hereinafter called "Swift") as well as the plants of a number of other meat packers, have private sidings which are joined by switch connections with tracks of the New York Central Railroad Company (hereinafter called "New York Central"). These tracks are shown on the map, Appendix B, facing p. 90, *infra*. Some of these packers—Long Dressed Beef Co., Lake Erie Provision Co., and Ohio Provision Co.—have private sidings connected directly with the main line of the New York Central. The other packers, including the appellant Swift, are served by a portion of the New York Central's track known as Spur No. 245. Of this track, the portion connecting with and adjacent to the private sidings of Swift and the six other industries is 793 feet long and is owned by New York Central. The next intervening portion of track, 1619 feet long and known as Track 1619, is owned by the Cleveland Union Stock Yards Co. (hereinafter referred to as "Stock Yards") but is maintained and used by the New York Central as part of its terminal facilities. At the north end of this portion of track a third portion, 132 feet long, affords connection with the main line of the New York Central. (R. 30.)

On the map, Appendix B, the portions of track owned by the New York Central are shown in green, the portion owned by the Stock Yards is yellow, and the private tracks of the industries involved are shown in red. It will be noted that the private track of Swift connects directly with a part of Spur No. 245 that is owned by New York Central. Swift's track was built in 1910; it has been in constant use since that time (R. 31–32).

The other railroads serving the industries connected with Spur No. 245 do so pursuant to a reciprocal switching arrangement whereby New York Central performs the service and its switching charge is absorbed by the line-haul carriers when their revenue exceeds specified amounts. (R. 33.)

Since at least 1910, the New York Central tariff has provided for delivery at Swift's side track under its line-haul rates of all shipments reaching Cleveland via its own line. On November 12, 1938, however, the New York Central cancelled its switching charge on livestock but continued it on all other freight. Since then, there has been no specific tariff authority for movement of livestock to Swift's siding when shipped to Cleveland over lines other than the New York Central, but the New York Central's tariff provision for delivery to Swift's side track of shipments moving over its own line has remained in effect. (R. 33.)

Nevertheless, for some time prior to November 12, 1938, and continuously thereafter, the carriers have refused to deliver any livestock to Swift's siding, whether moved to Cleveland in line-haul service by the New York Central or by other carriers. Instead they have delivered such shipments to the yards of the Stock Yards Company, and have collected the Cleveland line-haul rates. Stock so delivered is driven from the unloading pens through the Stock Yards to an exit directly across the street from Swift's plant, thence through movable gates across Track 1619 and across 65th Street into Swift's slaughterhouse. Yardage charges are collected by the Stock Yards Company for egress from the stock yards. (R. 33–34.)

Prior to 1930, the Stock Yards made no charge for this type of delivery, and little, if any, livestock was delivered directly to Swift's siding by the railroads, although tariff provisions were in effect authorizing such delivery at the Cleveland line-haul rates. About 1930, the Stock Yards attempted to charge packers for delivery effected at the Stock Yards. Thereupon, between January 1, 1930, and February 1, 1935, Swift had 1,161 carloads of livestock delivered directly to its siding. On such shipments it paid the line-haul rates to Cleveland (R. 34). Since August 14, 1941, Swift has billed all its inbound shipments of livestock to its siding, and has demanded delivery

there. The carriers have disregarded the shipper's routing instructions on such traffic, and have made delivery to the Stock Yards instead of to Swift's siding (R. 31). When the carriers ceased to make direct deliveries to Swift and began to make all deliveries at the Stock Yards, they absorbed the Stock Yard's charges until 1942 (R. 34). Since 1943, Swift has been required to pay charges to the Stock Yards in order to obtain possession of livestock unloaded at the Stock Yards (R. 34–35).

The carriers' justification for their failure to make delivery to Swift's siding was placed on the ground that such delivery would involve use of Track 1619, owned by the Stock Yards, and for the use of which it demanded payments which the carriers considered prohibitive (R. 35).

Track 1619 was constructed pursuant to an agreement of May 10, 1899, between the Stock Yards and The Cleveland, Cincinnati, Chicago and St. Louis Railway Company (the "Big Four"), predecessor of the New York Central (Exh. 14, R. 347). The Stock Yards did the grading, agreed not to authorize third parties to use the track without the railroad's consent, and became the owner thereof. The railroad laid the track and maintained it at the Stock Yard's expense. The railroad was given the right to use the track, without cost, for business other than that of the Stock Yards, provided such use did not interfere with the business of the Stock Yards. The rail-

road reserved the right, after 60 days' notice in writing, to discontinue the use of the track and remove the connections. (R. 30, 348–349.)

The New York Central keeps Track 1619 in repair and controls and operates the locomotives and other rolling stock which pass over it (R. 30).

A subsequent agreement of June 16, 1924 (Exh. 9, R. 339), superseded the original agreement made in 1899 (R. 30).

Paragraph 4 of the 1924 agreement (R. 340) was as follows:

> Fourth: All of said tracks, irrespective of ownership, shall be maintained by the Railroad without expense to the Industry; in consideration for which the Industry shall and by this instrument does grant to the Railroad, (a) the free occupancy of its land by any and all tracks or portions thereof located thereon belonging to the Railroad, and (b) the free and uninterrupted use of any and all tracks or portions thereof belonging to the Industry and located on its land.

The 1924 agreement also contained a 30-day termination clause (R. 341), but did not provide that railroad use of the track should not interfere with the Stock Yards' business (R. 30). On December 31, 1934, the Stock Yards gave notice under the cancellation clause (Exh. 31, R. 423–424) to the New York Central Railroad, successor through lease to the Big Four. Meanwhile, however, a new agreement effective February 1, 1935,

amended paragraph Fourth to read as follows (R. 339):

> Fourth. All of said tracks, irrespective of ownership, shall be maintained by the Railroad without expense to the Industry; in consideration for which the Industry shall and by this instrument does grant to the Railroad, (a) the free occupancy of its land by any and all tracks or portions thereof located thereon belonging to the Railroad, and (b) the free and uninterrupted use, *except for competitive traffic a charge for which use shall be the subject of a separate agreement,* of any and all tracks or portions thereof belonging to the Industry and located on its land.[1]

Under the 1924 agreement as under the one made in 1899, the railroad was entitled to "the free and uninterrupted use of any and all tracks or portions thereof belonging to the Industry and located on its land." But under the amendment made in 1935, there was a restriction against free movement of so-called "competitive" traffic, a term which was construed by all parties to mean "livestock". For such shipments of livestock the Stock Yards demanded that it be paid the same charges which it would have obtained if the livestock had been delivered to the Stock Yards in-

[1] Italics supplied. Except for the insertion of the italicized words, the 1924 agreement was not changed in any respect by the new agreement, which was dated January 25, 1935. (Erroneously printed at R. 338 as "1945", as appears from inspection of the original record.)

stead of directly to the consignees' siding (R. 31). This demand was considered exorbitant and prohibitive by the carriers, and it was for that reason that they ceased to deliver livestock over Track 1619 (R. 35).

However, direct deliveries of commodities other than livestock were continued to the sidings reached via Track 1619, and at other plants competitive with Swift but which could be reached without the use of Track 1619—Long Dressed Beef Co., Lake Erie Provision Co., and Ohio Provision Co.—the railroads continued to make direct deliveries of livestock at the line-haul rates (R. 32).

After Swift's demand on the carriers for direct delivery of livestock to its plants was formally refused by the carrier except as Swift might obtain the Stock Yard's consent for traversing Track 1619 (Exh. 4-5, R. 317–318), Swift filed its complaint before the Commission in September 1941, against The Baltimore and Ohio Railroad Company, The Pennsylvania Railroad Company, The Erie Railroad Company, The Wheeling & Lake Erie Railroad Company, and The New York Central Railroad Company. The Stock Yards was joined as a defendant in the proceeding, pursuant to Section 2 of the Elkins Act (*infra*, pp. 89–90).

The case was twice argued before the Commission (R. 465, 502), after which, on May 3, 1946, the full Commission issued its report (R. 28–50; 266 I. C. C. 55) and order (R. 65–66). The Com-

mission found violations of Section 3 (1), forbidding unjust preference or discrimination among shippers; of Section 1 (6), condemning unreasonable practices; and of Section 1 (9), requiring railroads to operate switch connections with private sidetracks. It accordingly ordered the defendants to cease and desist from the practice of refusing to deliver to the sidetrack of complainant in Cleveland, Ohio, interstate shipments of livestock carried over their lines and consigned thereto. The order further required defendants to establish tariffs providing for such delivery.[2] Petitions for reconsideration filed by the railroads (R. 571–600) and by the Stock Yards were denied on October 7, 1946 (R. 63),

[2] The operative paragraphs of the order are as follows (R. 66):

"It is ordered, that the above-named defendants, or either of them, be, and they are hereby notified and required to cease and desist, on or before the 30th day of August, 1946, and thereafter to abstain from refusing to deliver to the sidetrack of complainant in Cleveland, Ohio, complainant's interstate shipments of livestock carried over their lines and consigned thereto;

"It is further ordered, that said defendants, or either of them, be, and they are hereby, notified and required to establish and put in force, on or before the 30th day of August, 1946, upon not less than 30 days' notice to this Commission and to the general public, as provided in section 6 of the Interstate Commerce Act, and maintain in force thereafter, a schedule or schedules providing for the delivery to the sidetrack of complainant in Cleveland, Ohio, of its interstate shipment of livestock carried over defendants' lines and consigned thereto."

but by subsequent orders the order orginally made was extended so that its effective date was postponed to February 28, 1947, on five days' notice (R. 63, 50–52).

Meanwhile, on November 20, 1946, the railroads brought suit in the court below to set aside the order (R. 4–56), essentially on the ground that it transcended the Commission's statutory and constitutional powers (Par. VIII, R. 18–26). A similar action was filed by the Stock Yards (R. 88–96), which second proceeding was, at the hearing, consolidated with the railroads' action (R. 96). Answers were filed by the United States (R. 57, 96), by the Commission (R. 58–66, 97–103), and by Swift (R. 66–84, 104–106), which had been permitted to intervene (R. 104).

After hearing, the district court of three judges rendered its opinion on March 11, 1947 (R. 148–152), holding the Commission's order invalid because (R. 152) it "effectually subordinates and subjects the Stock Yards Company's ownership of its property to the beneficial use of Swift & Company without due process of law." Although the court in its opinion proceeded on that ground alone, and indicated the respect due the Commission's findings in matters within that body's jurisdiction (R. 149), the court's findings of fact and conclusions of law, filed May 9, 1947 (R. 178–189) are to the effect that there was no violation of Sections 3 (1), 1 (6), and 1 (9) of the Inter-

state Commerce Act, which sections the Commission had found to be violated.*

SUMMARY OF ARGUMENT

The inescapable effect of the ruling below is not only that an owner of private land over which a sidetrack connection with a railroad passes may, by contract, prevent shipments in interstate commerce except on such terms as it chooses to permit, but also that it may thereby oust completely the jurisdiction of the Commission to enforce the Interstate Commerce Act. The decision of the district court thus places the stamp of judicial approval on the erection and operation of private toll gates on interstate rail lines.

I. The railroads' refusal to make direct delivery of livestock to Swift's siding is a breach of their legal duty to the public as common carriers which the Commission had power to remedy by its order. Direct deliveries of livestock to Swift's siding were made from 1910 to 1935, and the railroads continued thereafter to make deliveries and accept shipments there of all traffic other than livestock. The New York Central has not abandoned its track which serves Swift's siding, and that carrier's tariff providing for delivery there of all shipments reaching Cleveland via its own line has never been cancelled. Consequently, with respect to livestock consigned to the Swift siding,

* Counsel for the appellants duly pointed out the inconsistency before entry of the findings and conclusions (R. 172).

the railroads are subject to the duties owed the public at common law and under the Interstate Commerce Act, and they are similarly subject to the regulatory jurisdiction of the Interstate Commerce Commission.

A. The railroads' duties will appear more clearly once it is assumed, contrary to the fact, that Track 1619 is owned by the New York Central.

On that assumption there has been a violation of Section 3 (1), because of the discrimination and singling out of livestock as the sole commodity which the railroads are refusing to deliver, and because Swift is subjected to prejudice since three of its competitors are accorded direct delivery to their sidings while such delivery is denied to Swift. Section 1 (6) is violated because these facts amount to an unreasonable practice; and Section 1 (9), which requires the operation of switch connections and the furnishing of cars for the movement of traffic thereover without discrimination, is therefore also violated.

B. The situation is not altered in any respect by the circumstance that, in fact, Track 1619 is owned by a non-carrier, since Section 1 (3) (a) of the Interstate Commerce Act makes that track a part of the New York Central's "railroad" regardless of ownership. Even if Track 1619 served only Swift instead of all seven industries which in fact are dependent on it, the use to

which it is put by the New York Central would constitute a public and not a private use, and the track would be a part of the carrier's facilities. Significantly, the court below ignored Section 1 (3) (a) of the Act, and undertook to substitute its own appraisal of evidence and its own administrative judgment for those of the Commission.

C. Nor is the situation altered by reason of the New York Central's contract with the Stock Yards which provides expressly for discrimination against livestock. That is the only obstacle in the path of the railroad's compliance with the Act. But no proposition is better settled than the rule that performance of the public duties of common carriers can not be avoided by reliance upon private contracts at variance with the carriers' statutory obligations. *E. g., Philadelphia, Balt. & Wash. R. R.* v. *Schubert,* 224 U. S. 603; *Louisville & Nashville R. R.* v. *Mottley,* 219 U. S. 467. Moreover, by the clear language of Section 2 of the Elkins Act, the Stock Yards was here subject to the Commission's jurisdiction, and was a proper party to the Commission's order.

D. The Stock Yards' right, if any, to compensation from the New York Central for use of its land had no bearing upon the validity of the Commission's order requiring the railroads to perform their duties to the public. Whether the Stock Yards as a matter of state law is now estopped from possessory remedies and in consequence con-

fined to an action for damages, what such damages, if any, might be, or whether the restrictive provision is void against public policy, need not be determined here. The nature and extent of the Stock Yards' rights against the New York Central have no effect on the validity of the Commission's order, any more than the rights of the Mottleys to compensation could affect the validity of the statutory prohibition against passes which was directed to the Louisville & Nashville.

II. The Commission's order does not appropriate the Stock Yards' property for the use of Swift; but the court below so held, apparently on the ground that although there is no taking of such property when hundreds of cars loaded with non-livestock cargoes pass over Track 1619, the Constitution is violated once the Commission requires that a single carload of livestock be similarly hauled, without payment of a yardage fee for services not rendered. The fallacy in this approach lies in its failure to perceive that Track 1619 is devoted to the use of the New York Central and not to the use of Swift, and in its disregard of the decisions of this Court and of the Supreme Court of Ohio to the effect that spur tracks connecting one or more industries with the main line of a railroad are devoted to a public and not to a private use. The holding below, to the effect that the Commission's order amounted to "appropriation of the Stock Yards Company's property for the use of Swift & Company", is plainly and palpably wrong.

III. In any event, the Commission's order simply requires the railroads to deliver interstate livestock to Swift's track, and does not necessarily involve use of Track 1619. That order required no action on the part of the Stock Yards. How and upon what terms the trackage rights needed for the performance of proper service are obtained is a matter of railroad responsibility and managerial discretion. This Court has several times declared, not only that a carrier may not excuse discriminatory service on the ground of inadequate facilities (*Mitchell* v. *United States*, 313 U. S. 80; *United States* v. *Pennsylvania R. Co.*, 266 U. S. 191), but also that the performance of public service by common carriers is a matter of paramount public concern which must not be interfered with because of the pendency of landlord-and-tenant controversies in respect of compensation for property used in railroad service (*Smith* v. *Hoboken R. Co.*, 328 U. S. 123; *Thompson* v. *Texas Mexican R. Co.*, 328 U. S. 134).

Whether the Stock Yards may now terminate the New York Central's right to use Track 1619, as it threatened to do after the Commission's order in this case, need not be considered here, primarily because a power to discriminate is not a lesser right included within the power to withdraw altogether. Nor is it necessary to consider whether such a withdrawal would require the New York Central to condemn the necessary trackage rights, in order to comply with the Commission's

order under Section 1 (9). The Commission's power under that provision is not destroyed by the exemption in Section 1 (22). *Cleveland, etc., Ry. v. United States*, 275 U. S. 404. In any event, the New York Central has threatened no abandonment; and Swift as a shipper which has built its siding to the railroad's line is no more bound to look to the title to Track 1619, and is no more bound by knowledge of any infirmity in that title, than it is concerned with the title to or the contractual arrangements respecting any portion of the right-of-way of the railroad system to which its private tract connects.

The order of the Commission requiring the railroads to render nondiscriminatory service was valid, and the judgment of the district court, which sanctions the continued enforcement of a contract obstructing the free flow of interstate commerce by the levy of a discriminatory toll on a single commodity, should be reversed.

ARGUMENT

The inescapable effect of the district court's holding is not only that any owner of private land over which a spur or sidetrack connection with a railroad passes may, by contract, prevent shipments in interstate commerce except on such terms as it chooses to permit, but also that it may thereby oust completely the jurisdiction of the Commission to enforce the provisions of the Interstate Commerce Act. The decision below thus puts the stamp of judicial approval on the erec-

tion and operation of private toll gates on interstate rail lines. If permitted to stand unreversed, the ruling below will be productive of serious consequences adversely affecting the public interest in an efficient and adequate public transportation system, in direct violation of the National Transportation Policy declared by Congress (*infra*, p. 77).

These consequences follow because the decision under review is clearly erroneous as a matter of law. First, a railroad carrier subject to the provisions of the Interstate Commerce Act cannot enter into a contract the effect of which is to abrogate its obligations under that Act; the court below held that it could, and enforced the contract. Next, the clear language of Section 2 of the Elkins Act (*infra*, pp. 89–90) subjects to the jurisdiction of the Commission any party affected by a practice under consideration, and authorizes orders to be made against such parties to the same extent as are authorized with respect to carriers; the decree below prevents the Commission from forbidding obvious discrimination in the use of the carrier's sidetrack or terminal at Cleveland merely because a portion of such sidetrack or terminal is leased by the carrier from a noncarrier.

The basic and all-pervading error of the court below was its failure to recognize that a piece of track need not be owned by the operating carrier in order to be subject to the requirements of the

Interstate Commerce Act. Section 1 (3) (a) (*infra*, p. 78) specifically provides that the term "railroad" shall include "* * * all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of * * * persons or property * * * including all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property." We think it clear from the record that the railroad operated over the 1,619 feet of track for over forty years "under a contract, agreement, or lease," and that, as the Commission found, the track has in fact been devoted to a public use. Whether such devotion to a public use in fact constituted a dedication to a public use as a matter of law is a question of Ohio real property law; the significant point here, in our view, is that, by reason of Section 1 (3) (a) of the Interstate Commerce Act, Track 1619 is just as much a part of the New York Central's railway system and equally subject to the requirements of the statute as any other 1,619 feet of track located wheresoever it may be in the same system, and that the ownership of Track 1619 is quite as immaterial as the ownership of any other portion of the New York Central's underlying right-of-way.

The error of the court below is emphasized by

the inconsistency between its opinion on the one hand and its findings and conclusions on the other. The opinion holds the Commission's order invalid on the sole ground that the order amounted to a taking of the Stock Yards' property without compensation, for the benefit of Swift; it specifically stated (R. 148) that the facts were not in dispute and were fully set out in the Commission's report, and noted (R. 149) that "We are mindful of the Commission's powers and of the effect to be given its findings in respect of matters within its jurisdiction." But the court's findings and conclusions are to the effect that there was no legal basis for the Commission's findings of violations of Section 1 (6), condemning unreasonable practices, of Section 1 (9), requiring railroads to operate switch connections with private sidetracks, and of Section 3 (1), forbidding unjust preferences or discrimination among shippers. Thus the court in its findings and conclusions does precisely what the court in its opinion said it could not and should not do.

I. THE RAILROADS' REFUSAL TO MAKE DIRECT DELIVERY OF LIVESTOCK TO SIDINGS LOCATED ON THEIR LINE IS A BREACH OF THEIR LEGAL DUTY TO THE PUBLIC AS COMMON CARRIERS, WHICH THE COMMISSION HAD POWER TO REMEDY BY ITS ORDER

The New York Central, and other railroads involved herein, are unquestionably common carriers engaged in interstate transportation of gen-

eral commodities, including livestock. No claim is made that their undertaking or holding out to transport for the public is limited to transportation of passengers, as distinguished from freight (cf. *Northern Pacific Railway* v. *North Dakota*, 236 U. S. 585, 595), or to transportation of certain particular commodities, excluding livestock. In fact they deliver livestock to the private sidings of various packers in Cleveland; and indeed do not refuse to haul livestock consigned to Swift's plant in Cleveland, although they do disregard the routing instructions on such traffic and instead of making delivery at Swift's private siding connecting with the New York Central they make delivery to the Stock Yards. This practice enables the Stock Yards to collect a charge for permitting the livestock to go through its own gates and to cross the street to Swift's plant. Ever since installation in 1910 of the switch connection between the New York Central track and the private sidetrack at Swift's Cleveland plant, the New York Central tariff has provided for delivery at Swift's siding of all shipments reaching Cleveland via its own line,* and until November 12, 1938, the railroads' tariffs provided by means of a switching charge for direct delivery at Swift's siding of livestock

* References here to the New York Central include its predecessor, the Cleveland, Cincinnati, Chicago and St. Louis Railway (or "Big Four"), which in 1939 was taken over for direct operation by the New York Central.

shipped to Cleveland over lines other than the New York Central. From 1910 to 1935 the railroads made direct deliveries of livestock to Swift's siding; and they continued thereafter to make deliveries and accept shipments there of all kinds of traffic other than livestock. There has been no abandonment of the New York Central track serving Swift's siding (compare pp. 66–72, *infra*). It is, therefore, quite clear that with respect to livestock traffic consigned to the Swift siding the railroads are subject to the duty owed to the public by an interstate common carrier by rail, including the statutory obligations imposed by the Interstate Commerce Act as amended, and that they are similarly subject to the regulatory jurisdiction of the Interstate Commerce Commission.

A. If Track 1619 were owned by the New York Central, then clearly the Interstate Commerce Act has been violated, and the Commission's order would be unassailable.

The issues in the present case will appear more clearly, and the duties resting on the carrier will be brought into sharper focus, if we assume, contrary to the fact, that Track 1619 is owned by the New York Central. Thereafter, once those duties have been discussed and analyzed, we shall be ready to consider whether and to what extent the carrier's duties are varied by reason of its non-ownership of that portion of its system.

The Commission in its report, after summariz-

ing applicable provisions of the Interstate Commerce Act which define some of the public duties of common carriers and enforcement powers of the Commission (R. 35–36; 266 I. C. C. at 62–63), went on to find that three specific provisions of the Act had been violated: Section 3 (1), prohibiting undue preference and prejudice; Section 1 (6), prohibiting unreasonable practices relating to delivery; and Section 1 (9), requiring the operation of switch connections and furnishing of cars for the movement of traffic thereover without discrimination. (R. 41, 42, 45; 266 I. C. C. at 68, 69, 72.) It is plain that the undisputed facts set forth in the Commission's report would disclose unquestioned violations of these provisions of the Act[5] if the New York Central had owned Track 1619.

Section 3 (1) is violated in two respects: Livestock traffic is subjected to an undue prejudice as compared with other species of traffic, in violation of the provision that carriers shall not subject "any particular description of traffic" to such a disadvantage. Moreover Swift is subjected to undue prejudice, and its competitors receive a corresponding preference, in violation of the prohibitions against so treating "any particular person." It seems evident, as the Commission

[5] The facts disclosed would apparently also have constituted violations of Sections 1 (4) and 2 (*infra*, pp. 79, 85), but the Commission did not make specific findings under those sections.

holds, that the railroads cannot lawfully single out and exclude livestock from the traffic transported by them as common carriers over their lines. *Louisville & Nashville R. Co.* v. *United States*, 238 U. S. 1; *Louisville & Nashville R. Co.* v. *United States*, 242 U. S. 60, 74; *Northern Pacific Ry. Co.* v. *United States*, 316 U. S. 346, 347-8; *Interstate Stock-Yards Co.* v. *Indianapolis Union Ry. Co.*, 99 Fed. 472, 483 (C. C. D. Ind.). As this Court said in the case first cited (238 U. S. at 19):

> Having made the Yard a facility for many purposes and to many patrons, such railroad facility is within the provisions of § 3 of the statute which prohibits the facility from being used in such manner as to discriminate against patrons and commodities. The carriers cannot say that the Yard is a facility open for the switching of cotton and wheat and lumber but cannot be used as a facility for the switching of coal. Whatever may have been the rights of the carriers in the first instance; whatever may be the case if the Yard was put back under the protection of the proviso to § 3, the Appellants cannot open the Yard for most switching purposes and then debar a particular shipper from a privilege granted the great mass of the public. In substance that would be to discriminate not only against the tendering railroad, but also against the commodity which is excluded from a service performed for others.

It seems equally evident that Swift is subjected to

a competitive disadvantage when three competitors in Cleveland (Lake Erie Provision Company, Long Dressed Beef Company, and Ohio Provision Company) are accorded direct delivery to their private sidings while such delivery is denied to Swift. As the Commission found (R. 41; 266 I. C. C. at 68)—

> This service is performed by the defendant carriers at the line-haul rates to Cleveland, and the three plants are all located in the same general section of the New York Central's Cleveland yard as that in which complainant's plant is located. The evidence shows, and we so find, that, with respect to the service, including the effecting of plant delivery, involved in transporting livestock to all of the plants, including that of complainant, the circumstances and conditions of transportation are substantially the same; that all plants are engaged in the same general business, buying their livestock in the same markets and disposing of the same dressed products in the same consuming territory; and that active competition exists between them in purchasing the live animals and in selling the dressed products. Accordingly, we conclude that the defendant carriers' failure, in connection with the transportation of carload shipments of livestock consigned to complainant's plant, to accord delivery thereof on the latter's sidetracks while according such service in connection with like shipments consigned to its competitors subjects com-

plainant to undue prejudice and unduly prefers the competing plants above named.

The violation of Section 1 (6) is equally plain. That provision requires railroads to observe "just and reasonable * * * practices affecting * * * rates, * * * the facilities for transportation, * * * and all other matters relating to or connected with the receiving, handling, transporting, storing, and delivery of property." Refusal to deliver livestock to Swift's plant, while delivering to Swift's competitors, is plainly a "practice" within the meaning of the statutory language. *United States* v. *Pennsylvania Railroad Company*, 266 U. S. 191, 199; *Missouri Pacific R. Co.* v. *Norwood*, 283 U. S. 249, 257; *Northern Pacific Ry. Co.* v. *United States*, 316 U. S. 346, 348; *California* v. *United States*, 320 U. S. 577, 584–5. The Commission's findings with respect to the facts bearing upon the reasonableness of the carriers' delivery practice are as follows (R. 41–42; 266 I. C. C. at 68–69):

> The railroad's spur and complainant's sidetrack are available today, just as they have been for years, for the delivery of livestock directly to complainant's plant. For years all the defendant railroads recognized that the performance of such service was included in the line-haul rates to Cleveland and, even today, the New York Central's tariffs provide for the service at such rates. The only reason advanced for the failure to perform such service is the question as to

the New York Central's right to use its spur for the delivery of livestock because of its contract with the Stock Yards respecting the use of track 1619. We have found, however, that such contract has not altered the common-carrier status of the spur or the railroad's duties with respect thereto under the provisions of the act. Accordingly, based on the above facts, circumstances, and considerations, we find and conclude that the defendants' failure, in connection with the transportation of carload shipments of livestock consigned to complainant's plant, to accord delivery thereof directly to the latter's sidetracks, is an unreasonable and unlawful practice in violation of section 1 (6) of the act.

Violation of Section 1 (9) is likewise clearly established. This provision of the Act requires a railroad, upon application of a shipper, to "operate * * * a switch connection with any * * * private side track which may be constructed to connect with its railroad" where such connection is safe, practicable, and will furnish sufficient business, and to "furnish cars for the movement of such traffic to the best of its ability without discrimination in favor of or against any such shipper." The Commission found that Swift is a "shipper" within the meaning of Section 1 (9), and that all the other conditions existed which the statute requires as prerequisite to the issuance of an order thereunder by the Commis-

sion. These findings specify that (R. 43, 44–45; 266 I. C. C. at 70, 71–72):

> The switch connection is actually built and in operation for all traffic other than livestock, and clearly is a part of the railroads' common-carrier facilities as defined in section 1 (3) (a). We can require its operation for livestock upon reasonable terms, provided the connection "is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same." The parties concede that the sidetrack and switch connection fully meet these quoted provisions of the law and that the only obstacle to their use for livestock is the contract discussed herein. We have said that track 1619 is now, and for years has been, devoted to a public use.
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> We find that the complainant has made application in writing to the carrier for operation of the switch connection discussed and has tendered interstate traffic to such carrier; that the New York Central has refused to maintain or operate such connection for the transportation of livestock to complainant's plant; that the facts shown above depicting operation over the track for a number of years for the transportation of livestock and since used for the transportation of commodities other than livestock shows that the connection

is practicable and may be made with safety and such refusal constitutes justification for the connection, and that the number of carloads of livestock which complainant is ready and willing to have transported by railroad will furnish reasonable compensation to the carrier with whose line the connection is made, in this case the New York Central. We also find that the failure or refusal of the defendant, New York Central, to furnish cars for the movement of livestock traffic to complainant's plant at Cleveland, Ohio, while furnishing cars for the movement of other classes of traffic, constitutes a discrimination against Swift & Company within the meaning of this section. Consequently, we find that a violation of section 1 (9) of part I of the Interstate Commerce Act follows. This paragraph forbids discrimination against any shipper, resulting from a failure on the part of the carrier to comply with its requirements. The facts show such a violation against the complainant, resulting from defendant's failure to accept and transport its shipments of livestock over the connection under the circumstances discussed in this report.

Clearly, then, on the assumption that Track 1619 was owned by the New York Central, the railroads' refusal to make direct delivery of livestock to Swift's siding is a breach of their duties to the public as common carriers, and

was correctly held by the Commission to constitute a violation of Sections 3 (1), 1 (6), and 1 (9) of the Act.

B. *In view of Section 1 (3) (a) of the Interstate Commerce Act, the situation is not altered in any respect by the circumstance that Track 1619 is owned by a non-carrier.*

It remains now to consider whether the circumstance that Track 1619 is owned by the Stock Yards, a non-carrier, alters either the duties of the railroads or the authority of the Commission. We think it clearly does not. The provisions of Section 1 (3) (a) of the Interstate Commerce Act—which the court below significantly ignored throughout—make it abundantly plain that ownership of a railroad's right-of-way, or of any part thereof, does not vary in the slightest degree the railroad's duty as a carrier. That section (*infra*, pp. 78–79) provides in pertinent part:

> * * * The term "railroad" as used in this part shall include * * * all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, including all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property.

> The term "transportation" as used in this part shall include * * * all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, * * * and handling of property transported.

In view of this provision of law, the Commission was bound to find that all of New York Central's Spur No. 245, including that portion thereof designated as Track 1619, was a part of that railroad's common-carrier facilities.

With respect to the applicability of Section 1 (9), it may be noted that the Commission's order is authorized under that section without regard to the status of Track 1619, for the reason that Swift's private siding connects with track of the New York Central owned by that carrier. Swift's private siding connects with New York Central track quite as much and quite as clearly as do the private sidings of its competitors, Long Dressed Beef Co., Ohio Provision Co., and Lake Erie Provision Co. As the map in Appendix B shows, Swift's connection is made with the portion of Spur No. 245, which is actually owned by the New York Central, viz., the green portion south of the railroad's main line. Section 1 (9) deals with a carrier's duties in respect of private sidings constructed "to connect with its railroad." *Cleveland, etc., Ry.* v. *United States,* 275 U. S. 404, 408.

Consequently, whatever view may be taken with respect to the status of Track 1619, it is clear that Section 1 (9) is applicable because of the direct connection of Swift's siding with the New York Central's own track. That such track is a part of the New York Central's "railroad" within the meaning of Section 1 (9), is shown by reference to the above-quoted definition of "railroad" given in Section 1 (3) (a).

But the definition in Section 1 (3) (a) is extensive enough to embrace also the portion of Spur No. 245 which is owned by the Stock Yards, but maintained and used by the New York Central. Track 1619 is "road in use by" a "common carrier" operating a railroad. The statute goes on to specify that the definition includes such road "whether owned or operated under a contract, agreement, or lease." A specific provision is then added, including within the definition of railroad all "spurs, tracks, * * * and terminal facilities of every kind used or necessary" in the transportation of property, including all yards and grounds "used or necessary in the transportation or delivery of any such property." The term "transportation" is defined as including "all services in connection with the receipt, delivery, * * * and handling of property transported," a definition which, as applied by this Court in *Pennsylvania Co.* v. *United States,* 236 U. S. 351, 363, 366, carries an obviously broad interpre-

tation.[6] Moreover, "transportation" is specifically stated by the Act to include "all instrumentalities and facilities of shipment or carriage, *irrespective of ownership or of any contract, express or implied, for the use thereof* * * *." [Italics added.]

In view of the foregoing statutory language, we think it plain that Track 1619 constitutes a part of the New York Central's "railroad" and that its use is governed by the statutory obligations of the New York Central as a common carrier.

And the same conclusion follows from judicial decisions regarding the status of tracks employed by railroads for the delivery of freight to private sidings. Numerous decisions indicate that the use to which Track 1619 is put by the New York

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[6] "There can be no question that when the Pennsylvania Railroad used these terminal facilities in connection with the receipt and delivery of carload freight transported in interstate traffic, it was subject to the provisions of the Act, * * *. By the amendments to the Act, the facilities for delivering freight of a terminal character are brought within the terms of the transportation to be regulated." (236 U. S. at 363.)

* * * * *

"As we have heretofore shown, the Act, as it now is, provides that transportation which must be furnished to all upon equal terms includes the delivery of freight as part of its transportation. While § 3 remains part of the Act in its original form, it must be given a reasonable construction with a view to carrying out all the provisions of the Act and to make every part of it effective, in accordance with the intention of Congress." (236 U. S. at 366.)

Central constitutes a public use, embraced within the railroad's obligations as a common carrier. If necessary, the New York Central could exercise the power of eminent domain and condemn the right to use Track 1619 for transportation of all types of traffic to and from the private sidings of Swift and the other industries served by Spur No. 245. *Union Lime Co.* v. *Chicago & Northwestern Ry. Co.*, 233 U. S. 211, 220–222; *Alton R. Co.* v. *Illinois Comm'n.*, 305 U. S. 548, 553; *Milheim* v. *Moffat Tunnel Dist.*, 262 U. S. 710, 719–720; *Chicago & Northwestern Ry. Co.* v. *Ochs*, 249 U. S. 416, 419–420; *F. C. Ayres Mercantile Co.* v. *Union Pacific Railroad Co.*, 16 F. 2d 395, 398 (C. C. A. 8); *Morgan Run Railway Co.* v. *Public Utilities Comm.*, 98 Ohio St. 218, 227; *Barlotti* v. *Public Utilities Comm.*, 103 Ohio St. 647, 656; Ohio Gen. Code § 8759. See pp. 51–64, *infra*. Track 1619 is not a private siding of Swift & Company at all.[1] Swift's private siding connects directly with another portion of New York Central Spur No. 245. That spur serves seven industries, and is not used exclusively for the traffic of Swift & Co. But even if Track 1619 served only Swift & Co., it would still be part of the pub-

[1] Track 1619 would not be regarded as a private track of Swift & Company within the meaning of tariff provisions for demurrage charges. See *Swift & Company* v. *Hocking Valley Railway Company*, 243 U. S. 281, 286; *National Refining Co.* v. *St. Louis, I. M. & S. Ry. Co.*, 237 Fed. 347 (C. C. A. 6).

lic facilities of the railroad up to the point where it connects with Swift's private siding.

Similar considerations are applicable in determining whether the non-carrier ownership of Track 1619 vitiates the Commission's finding of a violation of Section 3 (1).

The court below concluded (XII, R. 187–188) that there was no undue or unreasonable prejudice and disadvantage to Swift & Co. in violation of Section 3 (1) because of the "pronounced dissimilarity" in the track connections of Swift's competitors, which can reach the railroad's main line without the use of Track 1619. There are several answers to this holding, which, as already noted, goes beyond and is inconsistent with the rationale of the opinion.

To begin with, the determination whether prejudice or preference under Section 3 (1) is or is not undue has been recognized as an administrative matter within the sole jurisdiction of the Commission since at least *Pennsylvania Co.* v. *United States,* 236 U. S. 351, 361. Moreover, in any event, the Commission found (R. 41; 266 I. C. C. at 68) that "with respect to the service, including the effecting of plant delivery, involved in transporting livestock to all of the plants, including that of complainant, the circumstances and conditions of transportation are substantially the same," and that the same similarity exists in respect of commercial competition. The

difference which the court below emphasized and on which appellees here insist is merely a circumstance of private concern to the railroads, with respect to the terms upon which they have acquired their facilities, and has no bearing upon the character of the transportation service to be accorded the public, the subject matter with which Section 3 (1) deals. When Swift & Co. connected its siding to the New York Central spur at 63rd Street, Cleveland, the ownership of the intervening Track 1619 was as little relevant to the New York Central's duty to furnish nondiscriminatory service as the ownership of that road's main line or the nature of the mortgage liens on any portion thereof.*

* Even with Section 1 (3) (a) out of the case, i. e., assuming *arguendo* that Track 1619 is not a facility which the railroads may use in delivering livestock to Swift, the law is clear that carriers may not justify discriminatory treatment in violation of Section 3 by showing that they lack the facilities for affording nondiscriminatory service to the injured party. *Mitchell* v. *United States*, 313 U. S. 80, 90, 96; *United States* v. *Pennsylvania Railroad Co.*, 266 U. S. 191, 198–199. In the case last cited the Court characterized as "unsound" the argument, identical with appellees' contention here, "that a preference granted certain shippers served by a carrier by virtue of the ownership of tracks or trackage rights over other shippers not reached by the carrier, because it does not own tracks or trackage rights which would enable it to reach them, cannot warrant a finding of undue discrimination." Consequently, even upon the untenable assumption that the railroads may not use Track 1619 for livestock traffic, the Commission's order, insofar as it was based on findings under Section 3 (1), must be upheld.

The court below said in its opinion (R. 152),

> To require the service sought by Swift & Company not only would amount to appropriation of the Stock Yards Company's property for the use of Swift & Company, but would in effect prefer Swift & Company over others who built and own their own connecting switches or sidetracks.

We deal at length below, pp. 50–64, with the fallacy inherent in the notion that the property of the Stock Yards has been taken for the use of Swift. The point presently pertinent is that the district court erred in suggesting that the Commission's order would give Swift a preference. For the fact of the matter is that Swift built its own connecting sidetrack in 1910, that it still owns that track—shown in red on the map, Appendix B—and that Swift's sidetrack is, equally with those of its competitors, connected with tracks owned by the New York Central (marked green on the map). The circumstance that Swift connects with a part of Spur No. 245 while its three competitors to the north connect with the carrier's main line is of course immaterial, once Sections 1 (3) (a) and 1 (9) are, as they must be, read together. There is nothing in the Interstate Commerce Act which requires that a shipper must connect only with main lines of carriers in order to enjoy nondiscriminatory service and switching privileges.

and the court below commtted plain error when, in effect, it held that there was.

Consequently, on the facts of record with respect to the non-carrier ownership of Track 1619, the railroads' refusal to make direct delivery of livestock to Swift's private track is a breach of their public duties as common carriers, and was correctly held by the Commission to constitute a violation of Sections 3 (1), 1 (6), and 1 (9) of the Interstate Commerce Act. The Commission's order requiring the carriers to cease and desist from the practices thus found to be unlawful was therefore a valid exertion of the Commission's regulatory authority. The judgment of the court below setting that order aside was erroneous in that, *inter alia*, it wholly ignored Section 1 (3) (a) of the Act, and undertook to substitute its own appraisal of evidence and its own administrative judgment for the findings and administrative determination of the Interstate Commerce Commission.

C. *Nor is the situation altered by reason of the New York Central's contract with the Stock Yards which provides expressly for discrimination against livestock, since common carriers cannot by contract relieve themselves from their duties to the public.*

The court below concluded (XVI, R. 189) that "Common carrier services over private sidings and private industrial tracks cannot be compelled, where obstructions against the use thereof, either

legal or physical, not caused by a carrier, prevent it from entering upon those tracks, nor is it within the jurisdiction of the Commission to order a carrier, or any other party, to take steps to remove such obstructions."

Track 1619 interposes no physical obstructions to the carriage of interstate freight from the New York Central's main line to Swift & Co.'s private switch. Physically the road is just as uninterrupted now as it has been since the switch connection was first made in 1910, and in fact the railroads deliver to Swift & Co. cars containing every commodity other than livestock.* Consequently the only obstruction is the contract between New York Central and the Stock Yards, as amended in 1935, with its specific provision requiring discrimination against livestock. It is that contract which constitutes the principal, indeed the sole excuse, advanced by the carriers here for their failure to perform their duty of delivering livestock to Swift's siding. And, therefore also, the only question as to the Commission's power is whether it can require the rendering of nondiscriminatory service by the carrier in the face of that provision.

If the court below is correct, if the contractual

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* We are advised that the Stock Yards' letter purporting to terminate the New York Central's right to use Track 1619 (Exh. E, R. 54–56) was in effect withdrawn after the judgment below, and that since that time Track 1619 has been, and is now being, used for the transportation of all commodities other than livestock. See *infra*, pp. 67–69.

provision which affirmatively requires discrimination can relieve the railroad from its statutory duty to render service without discrimination and can strip the Commission of its power to require carriers to render nondiscriminatory service, then, a new and easy road is open for the evasion of duties required by law. Obviously the court below is in error. No proposition is better settled than the rule that performance of the public duties of common carriers cannot be avoided by reliance upon private contracts at variance with the carriers' statutory obligations. Just as "A man cannot justify a libel by proving that he has contracted to libel" (*Weston* v. *Barnicoat*, 175 Mass. 454, 458, *per* Holmes, C. J.), so a railroad cannot justify violating the Interstate Commerce Act by proving that it has contracted to do so. From the *Legal Tender Cases*, 12 Wall. 457, 549–551, through *Norman* v. *Baltimore & O. R. Co.*, 294 U. S. 240, 308, it has been iterated and reiterated that "Parties cannot remove their transactions from the reach of dominant constitutional power by making contracts about them."

This has been significantly so in the field of public utilities. Nearly sixty years ago, in *Gibbs* v. *Baltimore Gas Co.*, 130 U. S. 396, 410, the Court said:

> It is also too well settled to admit of doubt that a corporation cannot disable itself by contract from performing the public duties which it has undertaken, and

> by agreement compel itself to make public accommodation or convenience subservient to its private interests.

In similar vein, Mr. Justice Hughes (as he then was) declared for the Court in *Philadelphia, Balt. & Wash. R. R.* v. *Schubert*, 224 U. S. 603, 613–614, that—

> To subordinate the exercise of the Federal authority to the continuing operation of previous contracts, would be to place, to this extent, the regulation of interstate commerce in the hands of private individuals and to withdraw from the control of Congress so much of the field as they might choose by prophetic discernment to bring within the range of their agreements. The Constitution recognizes no such limitation. It is of the essence of the delegated power of regulation that, within its sphere, Congress should be able to establish uniform rules, immediately obligatory, which as to future action should transcend all inconsistent provisions. Prior arrangements were necessarily subject to this paramount authority.

The force of the principle was perhaps most strikingly demonstrated in *Louisville & Nashville R. R.* v. *Mottley*, 219 U. S. 467, where the rule was retroactively applied to invalidate an agreement entered into for a peculiarly meritorious consideration. Mottley and his wife had been seriously injured in a collision through the negligence of the railroad, and had settled their

claim in 1871 in return for the railroad's agreement to issue them free passes for life. Thirty-five years later, the Hepburn Act forbade the further issuance of passes (with exceptions which did not include the Mottleys), and prohibited any "different compensation" for transportation other than the published rates which were payable in money. The railroad refused to issue further passes; the Mottleys sued for and obtained from the Kentucky courts a decree requiring specific performance of the 1871 agreement; this Court reversed, on the ground that the 1906 statute was paramount and rendered the earlier contract unenforceable. The Court said (219 U. S. at 483, 485–486):

> After the commerce act came into effect no contract that was inconsistent with the regulations established by the act of Congress could be enforced in any court. The rule upon this subject is thoroughly established.
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> We forbear any further citation of authorities. They are numerous and are all one way. They support the view that, as the contract in question would have been illegal if made after the passage of the commerce act, it cannot now be enforced against the railroad company, even though valid when made. If that principle be not sound, the result would be that individuals and corporations could, by contracts be-

> tween themselves, in anticipation of legislation, render of no avail the exercise by Congress, to the full extent authorized by the Constitution, of its power to regulate commerce. No power of Congress can be thus restricted. The mischiefs that would result from a different interpretation of the Constitution will be readily perceived.

These principles are squarely applicable in the case at bar. The railroads cannot escape performance of their duties to the public as common carriers by pleading that such performance is precluded by the terms of an agreement with the Stock Yards Company. The New York Central's statutory obligations to the public are paramount and must prevail over any privately created arrangements arising from its contract of February 1, 1935, with the Stock Yards. Hence the railroads' duty to make direct delivery of livestock to Swift's siding may properly be enforced by the Commission's order.

Moreover, by the clear language of Section 2 of the Elkins Act (*infra*, pp. 89–90) the Stock Yards was subject to the jurisdiction of the Commission in the circumstances of this case, and was a proper party to the Commission's order. The Stock Yards falls squarely within the statutory language—"parties * * * affected by the * * * practice under consideration"—and within the authority granted the Commission thereby, viz., that "orders, and decrees may be

made with reference to and against such additional parties in the same manner, to the same extent, and subject to the same provisions as are or shall be authorized by law with respect to carriers." Certainly if words are to be given their ordinary meaning, the Commission had power to make an order against the Stock Yards in order to enforce the provisions of the Interstate Commerce Act; and such decisions as there are under Section 2 of the Elkins Act confirm that view. See *United States* v. *Milwaukee Refrigerator T. Co.*, 145 Fed. 1007 (C. C. E. D. Wis.); *Merchants' & Manuf. Traffic Ass'n* v. *United States*, 231 Fed. 292 (N. D. Cal.), reversed on other grounds, 242 U. S. 178; *United States* v. *Phillips Petroleum Co.*, 36 F. Supp. 480, 484 (D. Del.); *Glen Falls Portland C. Co.* v. *Delaware & Hudson Co.*, 66 F. 2d 490 (C. C. A. 2), certiorari denied, 290 U. S. 697; cf. *Spencer Kellogg & Sons* v. *United States*, 20 F. 2d 459 (C. C. A. 2), certiorari denied, 275 U. S. 566. And there is no authority to the contrary.

D. *The Stock Yards' right, if any, to compensation from the New York Central for the use of its land has no bearing upon the validity of the Commission's order requiring the railroads to perform their duties to the public.*

The circumstance that the Stock Yards may have rights against the New York Central is wholly immaterial. We discuss some of those

possibilities under this heading. But even on the assumption that the New York Central comes under heavy liability to the Stock Yards by reason of compliance with the Commission's order, both still are required to comply with that order to the end that the policy of the Interstate Commerce Act may be carried out. The situation is the same as the relations between the Mottleys and the Louisville & Nashville after the latter could no longer lawfully issue annual passes. As this Court said (219 U. S. at 486),

> Whether, without enforcing the contract in suit, the defendants in error may, by some form of proceeding against the railroad company, recover or restore the rights they had when the railroad collision occurred is a question not before us, and we express no opinion on it.

So here: the rights and obligations of the New York Central and the Stock Yards *inter sese* are immaterial to any consideration of their duties in respect of the public, of Swift, and of other shippers. The railroads are required by law to render non-discriminatory service to the public and have been ordered to comply with specified provisions of the Interstate Commerce Act. This case in its present posture involves nothing more.

It may well be, of course, that some compensation is due the Stock Yards here. In the *Mottley* situation, it was later established that the party

contracting with the railroad was entitled to recovery in cash, notwithstanding free transportation had been rendered illegal. *New York Central R. R.* v. *Gray*, 239 U. S. 583. For the sake of completing the discussion, we pause briefly to consider what the Stock Yards' claim here might properly be.

It should be emphasized by way of preliminary that recognition of the full rights of ownership enjoyed by the Stock Yards by no means implies that it must necessarily thereby have the power of preventing performance of any common carrier's obligations of public service. Quite apart from its actual knowledge and express agreement providing for public use of Track 1619 by the railroad, the Stock Yards must be deemed to have recognized, when permitting use of its land for purposes of public service by a company known to be a regulated public utility, that such service must be conducted by the carrier in a manner consistent with the duties to the public imposed by applicable regulatory legislation, and to have assented to such use of its property. A landowner in the position of the Stock Yards may well be estopped from possessory remedies, and limited to a claim for compensation. Having assented to the unrestricted public use of its land by a railroad company having power of eminent domain, over a period extending from 1899 to 1935, during which it never sought to impose limitations on the railroad's right to transport all types of

traffic, and having permitted and encouraged the railroad to construct the track and expend large sums for the maintenance of that track and others located on Stock Yards' property, the Stock Yards would probably be confined to an action for damages in order to obtain such compensation as it may be entitled to for the use of its land. *Coe* v. *Columbus, P. & I. R. R. Co.*, 10 Ohio St. 372, 411–412; *Goodin* v. *Cincinnati & W. Canal Co.*, 18 Ohio St. 169, 179; *Pennsylvania Co.* v. *Platt*, 47 Ohio St. 366, 382; *Short* v. *Railway*, 27 Ohio Dec. 294, 303; *Roberts* v. *Northern Pacific Railroad Co.*, 158 U. S. 1, 10–11; *Northern Pacific Railroad Co.* v. *Smith*, 171 U. S. 260. In the case last cited this Court pointed out (171 U. S. at 271, 275)—

> There is abundant authority for the proposition that, while no man can be deprived of his property, even in the exercise of the right of eminent domain, unless he is compensated therefor, yet that the property holder, if cognizant of the facts, may, by permitting a railroad company, without objection, to take possession of land, construct its track, and operate its road, preclude himself from a remedy by an action of ejectment. His remedy must be sought either in a suit in equity, or in a proceeding under the statute, if one be provided, regulating the appropriating of private property for railroad purposes.
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> This subject was fully considered by this court in the case of *Roberts* v. *Northern Pacific Railroad*, 158 U. S. 1, where, upon the foregoing authorities and others, it was *held* that if a landowner, knowing that a railroad company has entered upon his land and is engaged in constructing its road without having complied with a statute requiring either payment by agreement or proceedings to condemn, remains inactive and permits it to go on and expend large sums in the work, he is estopped from maintaining either trespass or ejectment for the entry, and will be regarded as having acquiesced therein, and will be restricted to a suit for damages.

Though the case at bar does not require determination of the quantum of compensation, if any, in addition to what it is now receiving, to which the Stock Yards may be entitled, there is, as the Commission points out (R. 40; 266 I. C. C. at 67), no reason to assume that the Stock Yards is justified in claiming that reasonable compensation for the use of its Track 1619 is to be measured by the amount of charges it would collect if the livestock moving over Track 1619 were handled by it through its Stock Yard facilities. Certainly whatever compensation is due cannot be collected by what is, in very plain effect, a penalty on livestock. Indeed, it seems reasonable to assume that in a condemnation proceeding or *quantum valebat* action the Stock Yards would probably receive nothing, on the ground that the

free maintenance, not only of Track 1619 but of all other tracks located on Stock Yards property, constituted full and adequate compensation for the use of this track. Track 1619, moreover, was of substantial value in the operation of the stock yards. These considerations are particularly compelling since the maintenance of the other tracks, unless regarded as consideration for the use of Track 1619, would probably constitute an unlawful rebate or gift received by the Stock Yards from the carrier.[10]

Furthermore, a court considering the controversy between the Stock Yards and the carrier might well conclude that no compensation at all is required, for the reason that the terms upon which the Stock Yards has agreed to use by the railroad may constitute under state law a complete dedication to the public use. If, however, no such dedication has taken place, then it is clear that the railroad could obtain by condemnation such rights to use Track 1619 as it may require to perform its public duties.[11] Track 1619's devotion to railroad use was unrestricted in the 1899 and 1924 agreements, and the Stock Yards did not undertake to impose any restrictive provision un-

[10] The Commission has held that the maintenance by railroads, without compensation and at their own expense, of private plant tracks involves a violation of the Elkins Act and of Section 6 (7) of the Interstate Commerce Act. *Morrell & Co. Terminal Allowance*, 263 I. C. C. 69, 73; *Sioux City Switching Case*, 241 I. C. C. 623.

[11] The Stock Yards admits that the railroad could exercise eminent domain (R. 482).

til 1935. It may well be that the discriminatory restriction there sought to be imposed is void as against public policy, viz., the common law of carriers, the statutory system established by the Interstate Commerce Act, and the provisions of the Sherman Act directed against restraints of trade. In that event, if the prior inclusive dedication is given effect under state law, there would be no right to compensation at all; or, if the cancellation clause were held a bar to dedication, then the basis of ascertaining compensation would be the Stock Yards' inability to give effect to that clause. Whatever the determination made, however, the property rights of the Stock Yards, and the quantum or extent of the Stock Yards' rights against the railroad, would not have the slightest effect on the validity of the Commission's orders, any more than the property rights of the Mottleys could affect the validity of the statutory mandate directed against the Louisville & Nashville.

II. THE COMMISSION'S ORDER DOES NOT APPROPRIATE THE STOCK YARDS' PROPERTY FOR THE USE OF SWIFT

Just as appellees urge that the terms of the New York Central's trackage agreement with the Stock Yards relieve them from their duties under the Interstate Commerce Act to render nondiscriminatory service to shippers, so also they put forward the terms of that agreement as a basis for their contention that the Commission's order would have the effect of unconstitutionally depriving the Stock Yards of property rights.

It is not urged that the Stock Yards' property is taken in contravention of the fundamental law when commodities other than livestock pass over Track 1619. As we read appellees' argument, there is no taking of property when hundreds or thousands of cars loaded with salt, lumber, lard, hides, or even dressed beef are hauled to and from the shippers served by Spur No. 245 over the track in question. But the argument is that the Constitution is violated once the Commission requires that a single carload of livestock be similarly hauled, without payment of a yardage fee for services not rendered—and that argument was adopted and approved in the opinion below.

Solicitude for the protection of the Stock Yards as an owner of real estate appears to have engrossed so completely the attention of the district court that it completely lost sight of the paramount and controlling considerations involved in this case, viz., the nature and primacy of the public duties owed by the carriers. This distortion of focus led the court below to view the Commission's orders as "subjecting the private property of the Stock Yards Company to the use of Swift & Company" (R. 150), and as resulting in "appropriation of the Stock Yards Company's property for the use of Swift & Company" (R. 151).

The manifest error inherent in this approach lies in the failure to perceive that Track 1619 is devoted to the use of the New York Central and

not to the use of Swift & Company. This would be true even if Swift were the only industry served, instead of being merely one of seven industries dependent upon the New York Central for access to railroad transportation. That the New York Central would have the right to exercise the power of eminent domain, if necessary, in order to obtain the use of Track 1619, is clear. Section 8759 of the Ohio General Code confers the power, and the Stock Yards does not contest its existence (R. 482). And this Court and the Supreme Court of Ohio have repeatedly held that the use of a spur track connecting one or more industries with the main line of a railroad is a public and not a private use. *Union Lime Co.* v. *Chicago and Northwestern Ry. Co.*, 233 U. S. 211; *Chicago & Northwestern Ry. Co.* v. *Ochs*, 249 U. S. 416; *Alton R. Co.* v. *Illinois Commission*, 305 U. S. 548; *Milheim* v. *Moffat Tunnel Dist.*, 262 U. S. 710, 719; *Morgan Run Ry. Co.* v. *Public Utilities Comm.*, 98 Ohio St. 218; *Barlotti* v. *Public Utilities Comm.*, 103 Ohio St. 647.

The holdings in this Court were summarized in *Alton R. Co.* v. *Illinois Commission, supra*, 305 U. S. at 553–555, as follows:

> We have held: The uses for which a track was desired are not the less public because the motive which dictated its location was to reach a private industry, or because the proprietors of that industry

contributed to the cost. *Hairston* v. *Danville & Western Ry. Co.*, 208 U. S. 598, 608. The State, consistently with the due process clause of the Fourteenth Amendment, may empower a common carrier by railroad to condemn a right-of-way for a spur leading to a single industry to be operated under obligations of public service open to all and devoted to public use. *Union Lime Co.* v. *Chicago & N. W. Ry. Co.*, 233 U. S. 211, 222. It may compel a railroad to extend a siding to an adjacent industry so as to provide additional trackage for public use and, if necessary, to condemn a right-of-way. *Chicago & N. W. Ry. Co.* v. *Ochs*, 249 U. S. 416, 419. For similar exertions of state power, see *Lake Erie & W. R. Co.* v. *Public Utilities Comm'n*, 249 U. S. 422, 424 and *Western & Atlantic Railroad* v. *Public Service Comm'n, supra.*

The decision of the state supreme court in this case must here be held conclusively to establish that under the constitution and laws of Illinois the order is valid. The decisions of this Court above cited leave no doubt as to the power of the State to require a common carrier by railroad to condemn rights-of-way for and to construct switch tracks like the one here involved. So far as concerns decision of this case, it matters not whether Illinois has exerted that power, for the track has been laid and is being used by the carrier. The required maintenance and operation are not beyond the scope of the carrier's undertaking to

serve the public. *Union Lime Co.* v. *Chicago & N. W. Ry. Co., supra. Chicago & N. W. Ry. Co.* v. *Ochs, supra.*

Assuming that the questions whether the switch track is open to public use and has become a part of the main line are so related to the constitutional issue here presented that the state court's determination of them is not binding upon this Court, we are of opinion that, upon the facts alleged in appellant's petition to the commission, the latter's unchallenged findings, and our decisions in similar cases, it is clear that in point of fact and law the switch track and any extensions of it that may be made are open to use to serve the public and constitute a part of the carrier's system.

Asserting that the duty to maintain a track such as that in question normally results from ownership, appellant earnestly insists that the order is shown to be unreasonable by the fact that rails and other materials purchased and owned by it when put into the track immediately cease to belong to it and become the property of the gas company which, appellant says, retains right of ownership in the track. But, in making that and similar arguments, appellant ignores the decisions in this case of the commission, the state supreme court, and as well the ruling of this Court just indicated, to the effect that the track in question is one built for industrial purposes on and across public thoroughfares; a track that has become a part of the main

line of the carrier's system and, though constructed without cost to it on lands owned by others, is open to public use; a track which has long been and is being used by the carrier for its own benefit and by it may be used with extensions if any shall be made, to serve the public at large.

Appellant does not suggest that as against the owners of the land or those who paid for building the track, it is a trespasser or without right to continue to maintain and operate the track as required by the order. Nor does it say that, by exertion of the power of eminent domain, it may not successfully resist demands of claimants or owners for possession of any part of the land or of the track not owned by it. See *Mapes* v. *Vandalia Railroad Co.*, 238 Ill. 142, 145; 87 N. E. 393; *Black* v. *Chicago, B. & Q. R. Co.*, 243 Ill. 534, 539; 90 N. E. 1075; *Roberts* v. *Northern Pacific R. Co.*, 158 U. S. 1, 11; *Northern Pacific R. Co.* v. *Smith*, 171 U. S. 260, 271.

The court below undertook to distinguish the *Alton* case on the ground that there the railroad did not suggest that it was a trespasser, whereas here the New York Central does (R. 150–151). But this overlooks completely the last paragraph just quoted, regarding the railroad's power of eminent domain which enables it to resist demands of claimants for possession of any part of the land or the track not owned by the carrier.

Moreover, it is clear as a matter of Ohio law

that a spur track, even though not owned by the railroad, is devoted to public and not private use where it is operated in conjunction with a railroad's own line for the transportation of freight. *Morgan Run Railway Co.* v. *Public Utilities Comm.*, 93 Ohio St. 218; *Barlatti* v. *Public Utilities Comm.*, 103 Ohio St. 647, both *supra*.

The *Morgan Run* case is closely analogous to the case at bar. The railroad there was a short line which operated from a junction with the Wheeling & Lake Erie Railway to the mines of the Morgan Run Coal & Mining Company. The carrier claimed, and the court assumed for the purposes of its decision, that a portion of the track was owned by, and was located on the property of the coal company. The railroad had operated the entire line of road, and published tariffs covering points located on the portion of track owned by the coal company. The complainants, John and Peter Ingham, owned a mine near the portion of the line which was located on the land of the coal company. When the Ingham mine chose to sell its coal to purchasers other than the Morgan Run Coal & Mining Company, the railroad refused to place cars for loading at the point previously used for that purpose by the Ingham mine, and abandoned service to that point without any authority from the Public Utilities Commission for such abandonment.

On the hearing the commission found that the railway company was operating as

> a common carrier the entire line of railroad owned by it and the coal and mining company, either or both, extending from the point of connection with the tracks of the Wheeling & Lake Erie Railway Company, at a point east of Coshocton known as Morgan Run, some three miles to the mines of the coal and mining company, and ordered it to furnish service as a common carrier and without discrimination to the complainants, and ordered it to connect and operate with the tracks now maintained the track abandoned without the consent of the commission, or provide at a point adjacent to its main track, near the point where the tracks cross the public highway at common grade, a suitable and adequate loading platform in lieu of the facility heretofore maintained adjacent to such abandoned track, or provide some other suitable means for the loading of complainant's coal, and that it move said cars, from time to time, to the junction of the Wheeling & Lake Erie railway. (98 Ohio St. at 222–223.)

This order of the Commission was affirmed by the court, which held that the railroad must comply with its statutory and common law obligation to operate without discrimination between shippers. In view of the marked factual similarity between this case and the one at bar, and the like similarity between the state statutes and the Interstate Commerce Act (R. 37), and also because of the authority of the decision as an exposition of the

Ohio law, we feel warranted in quoting from the opinion at some length.

The Supreme Court of Ohio said (98 Ohio St. at 226-229, 231-232):

> It is contended that the order of the commission requires the railway company to furnish facilities and operate a line on property not owned by it; that the commission has no jurisdiction to require one who is not a common carrier to act as such; and that the tracks which are located on the land of the coal and mining company are the private tracks of that company, over which the commission has no jurisdiction.
>
> Section 523, General Code, provides that the commission shall have the same control over private tracks, so far as such tracks are used by common carriers in connection with a railroad for the transportation of freight, as it has over tracks of such railroad. Section 8990, General Code, requires all railroad companies to extend to all persons receiving and shipping freight the same and equal opportunities. This statute is declaratory of the common law on the subject.
>
> * * * * * *
>
> It is contended that the order of the commission in this case in effect requires the railway company to extend its line over property which it does not own, to purchase equipment which it is unable to buy, and forces the coal company to grant the use

of its land to the railway company for the benefit of a competitor.

* * * * * * *

* * * assuming, without deciding, that the coal company was the owner of the portion of the line which it claims, we are still confronted with the fact that the railway company insists on a plan of procedure which will result in the operation, exclusively for the coal company's benefit, of all that portion of the line which is concededly owned by the railway company. As a common carrier, subject to the control of the state and its commission, the railway company denies to complainants the benefit of the provisions of Section 523, General Code, above set out. It must be noted that by the terms of that section it is not necessary that the railway company own the line. It is sufficient to give the commission jurisdiction that private tracks are used in common with the line of the railway company.

* * * * * *

Again assuming, for the purposes of this case, that the coal company owns the portion of the railroad claimed by it, and that the coal company itself made up the deficiency in the cost of operating the railroad, still the railway company has no right to make the discrimination found by the commission to be made. It is not a question as to the right of the railway company to take and use the lands or property of the

coal company without consent and without compensation. It is a question as to the right of a corporation, having all the rights and subject to all of the duties and obligations of a common carrier, to operate its own line for the exclusive benefit of the coal company, and to use the coal company's line over the coal company's property with its consent to transport its coal to and over the railway company's line, all to the exclusion of the general public or those who have the right to equal shipping privileges.

We therefore hold that as long as the railway company operates any portion of the railroad in question, it must do so without discrimination in favor of any shipper.

This is a small and unimportant railroad, whose operations are very limited, but the questions that are brought to the court for consideration are not limited. They affect every common carrier. If this company may arbitrarily select those whom it will serve, any company may do so.

The order of the Commission was modified so as to be effective over the line claimed by the coal company as long as it was used by the railway for the transportation of freight, and, as thus modified, it was affirmed. In a subsequent proceeding (*State ex rel. McGhee* v. *Morgan Run Ry. Co.*, 99 Ohio St. 439), the railway was ordered to cease to permit the coal company or any other person or corporation to operate its line of railway in any manner, or to move cars or equipment

thereon, until such other company should have been duly authorized under Ohio law to act as a common carrier railroad company.

The court below attempted to distinguish the first *Morgan Run* case on the ground that the railroad and the coal company were under common ownership and conspired together for the purpose of compelling the complainants to sell their coal to them at the price they would name (R. 151). But this is a distinction without a difference, which disregards additionally the subsequent proceeding reported in 99 Ohio State. And, in any event, the distinction suggested has no relevance to the railroad's duty to serve all shippers without discrimination. The reasons which may have motivated the carrier in discriminating are altogether immaterial. Discrimination, or other violations of a common carrier's obligations to the public, are unlawful without regard to the motives or reasons which may have produced them. It is not necessary, in order to justify action by a regulatory agency directed against such violations of common-carrier obligations, to show that they resulted from conspiracy with a shipper under common control. A railroad entirely independent, having no connection with shipper interests, and acting solely in pursuit of its own individual policy, may obviously be guilty of undue preference or other violations of its duties to the public as a common carrier.

The distinction advanced by the court below is untenable, and the *Morgan Run* case remains a highly persuasive precedent in the case at bar.[12]

Barlotti v. *Public Utilities Comm.*, 103 Ohio St. 647, is likewise a forceful expression of the law of Ohio on this subject. The carrier in that case, the Dillonvale & Smithfield Railroad Company, was lessor of a line about 4 miles long from Dillonvale to Bradley, where there was located a coal mine owned by the corporation which held the railroad company's stock. The branch line in question was operated by the Wheeling & Lake Erie Railroad Company as lessee, and was used solely to transport the coal company's product to market and to carry its merchandise to the company store in Bradley, a town of about 700 population with several stores, and the usual business, industrial and social activities of such a place. A full line of rates was established over the railroad to and from Bradley, but service was refused to other shippers than the coal company. The court held that such discrimination was prohibited by Section 567 of the General Code and that the company should be ordered to furnish

[12] The district court also sought to minimize the weight of the first *Morgan Run* case on the ground that it arose out of state statutes (R. 150). But the state statutes embody the same rules as the Interstate Commerce Act, and both declare broadly the common law rules applicable to common carriers. The *Morgan Run* decision, far from being weakened by the circumstance relied on, only serves to emphasize the departure of the ruling below from accepted principles of law.

reasonably adequate shipping facilities to the public without discrimination. It said (103 Ohio St. at 659):

> If the shipping business along the line of this short road is not sufficient to justify its maintenance and operation as a common carrier, it can be abandoned as such upon proper steps being taken. But having been constructed and operated by companies organized as common carriers under the laws of the state they must serve the public until such steps are taken.
>
> The line involved in this proceeding is small and its business not important, but the questions submitted to the court affect common carriers generally. If these defendant companies may arbitrarily determine what service they will render, and to whom, any company may do so.

The foregoing authorities, state and federal alike, clearly establish that the Commission's order in this case, which requires the New York Central to render non-discriminatory service to Swift, is not one subjecting the property of the Stock Yards to the private use of Swift, but that, quite to the contrary, the New York Central's service over Track 1619 would constitute a public use of that track by the railroad for common carrier purposes. As this Court remarked many years ago, "Whether the use of a railroad is a public or a private one depends in no measure upon the question who constructed it or who owns

it." *Olcott* v. *The Supervisors*, 16 Wall. 678, 695. It follows that the holding below, to the effect that the Commission's order amounted to "appropriation of the Stock Yards Company's property for the use of Swift & Company," is palpably and plainly wrong.

III. IN ANY EVENT, THE COMMISSION'S ORDER SIMPLY REQUIRES THE RAILROADS TO DELIVER INTERSTATE LIVESTOCK TO SWIFT'S TRACK, AND DOES NOT NECESSARILY INVOLVE ANY USE OF TRACK 1619

Proper analysis of the Commission's order would have shown the court below that what the Commission commanded required no action on the part of the Stock Yards, and did not even necessarily involve any use of Track 1619.

The Commission's order, quoted above, p. 10, directs the defendants (1) to cease and desist from refusing to deliver to Swift's side track interstate shipments of livestock carried over their lines and consigned thereto, and (2) to establish and put in force tariff schedules for such delivery (R. 66).[11] The order does not in terms require

[11] The latter provision of the order presumably relates to livestock traffic switched by the New York Central after line-haul transportation by other carriers, and contemplates re-establishment of New York Central's switching charges on such traffic and their absorption by the line-haul carriers, so that shipments may be delivered to Swift's side track at the Cleveland line-haul rates. In so far as traffic reaching Cleveland over the New York Central's own line is concerned, there has never been any abrogation of the tariff provision for delivery to Swift's side track at the Cleveland line-haul rates.

any action whatsoever by the Stock Yards; and even with respect to the action required of the railroads, the Commission's order could be complied with by the carriers without the use of Track 1619 at all, if they were prepared to substitute some other method of serving the Swift plant and of making direct deliveries of livestock thereto without utilizing the track owned by the Stock Yards. As a practical matter, the seven industries served by that track are now dependent upon it for access to railroad transportation. Regardless of the effect which the Commission's order may under these circumstances have upon the bargaining position of the railroads, clearly nothing in the trackage contract would prevent the carriers from complying with the Commission's order by furnishing the service required.

How and upon what terms the trackage rights needed for the performance of proper service are obtained is a matter of railroad responsibility and managerial discretion. Whether suitable facilities are procured by negotiation or by condemnation, or whether the compensation due the owner be great or small, are matters with which neither the shipper nor the Commission is here concerned. Any issues in dispute between the carrier and the landowner regarding the measure of compensation constitute a controversy quite separate from the dispute between Swift and the railroads which was decided by the Commission,

and this is equally true whether the carrier negotiates, whether it condemns, or whether it undertakes new construction. In any event, this Court has made it plain, not only that a carrier may not excuse discriminatory service on the ground of inadequate facilities (*Mitchell* v. *United States*, 313 U. S. 80, 90, 96; *United States* v. *Pennsylvania R. Co.*, 266 U. S. 191, 198–199), but also that the performance of public service by common carriers is a matter of paramount public concern which must not be interfered with because of the pendency of controversies between landlord and tenant in respect of compensation for property used in railroad service (*Smith* v. *Hoboken R. Co.*, 328 U. S. 123; *Thompson* v. *Texas Mexican R. Co.*, 328 U. S. 134). Consequently, whether the present difference between the New York Central and the Stock Yards over the compensation due the latter for the passage of livestock over Track 1619 is resolved by amicable negotiation, by litigation, by condemnation, or by the Gordian stroke of new construction, in any contingency neither the existence of the controversy nor the expense which may be occasioned in disposing of it justify the railroad in refusing nondiscriminatory service to Swift as the Interstate Commerce Act requires.

Whether the Stock Yards may now terminate altogether the use of Track 1619 is a matter of state law, whether—succinctly stated—devotion

to a public use over a period of nearly half a century (1899–1948) falls short of ripening into dedication to a public use because of the reservation of a right to cancel. We shall not undertake to resolve that question here, but we believe that some consideration of the right of the Stock Yards, if any, to withdraw Track 1619 from further use may be appropriate.

Throughout the hearings before the Commission, the Stock Yards consistently asserted that it did not desire to prevent use of Track 1619 by the railroad for making direct deliveries to the seven industries served thereby; it stated that it merely sought what it regarded as fair compensation for such use, viz., the collection of a yardage fee on all livestock passing over Track 1619, the same as though the stock had actually passed through the yards. In paragraph V of its answer filed before the Commission, the Stock Yards said:

> Admits that it is the owner of a certain track or tracks over which defendant railroads move cars in making delivery to complainant's plant at Cleveland, Ohio; but denies that it notified the railroad defendants that it would no longer permit the use of said railroad track or tracks by the railroad defendants in connection with the delivery of livestock to complainant's plant in Cleveland, Ohio; * * *

In its brief before the Commission, dated June 29, 1942, it said (pp. 4–5):

> Here again the complainant alleged but did not prove that the Stock Yards Company had notified the railroads that it would no longer permit the use of its tracks in effecting delivery of livestock to complainant's plant. The Stock Yards Company specifically denied that it gave such notice.
>
> * * * * *
>
> So far as the Stock Yards Company is concerned the tracks have at all times been available for the use in question. Their non-use results entirely from the choice of the railroads.

The same position was adhered to by the Stock Yards' president, Baker, in his testimony before the examiner (R. 303), and by the Stock Yards' counsel in his argument before the full Commission (R. 481–482, 483, 484).

It was not until after the filing of the Commission's report and the entry of its order that the Stock Yards, in November 1946, gave notice to the New York Central of the termination of the agreement covering Track 1619 (Exh. E, R. 54–56). That notice was in terms predicated upon the Commission's decision in the present case, and, significantly enough, was dated only five days prior to the filing of the railroads' complaint herein.

At the trial, this notice of termination was

offered in evidence by the Stock Yards, but excluded, as something that occurred after the date of the proceedings before the Commission (R. 142). Later, after the court set aside the Commission's order, the Stock Yards in effect withdrew the notice, and we are advised that, ever since the date of the judgment below, Track 1619 has been used for the transportation of commodities other than livestock, and that it is now so used. Whether, in the event of a reversal by this Court, the Stock Yards would again serve notice of cancellation, is of course only matter of conjecture.

But, whether or not the Stock Yards has a right to withdraw use of Track 1619 altogether—and that, as the Commission twice indicated (R. 38, 40; 266 I. C. C. at 65, 67), was a point on which it did not pass, we think it clear that the right to withdraw altogether does not justify a continuance of discrimination.

The Stock Yards maintained throughout that it was ready and willing to permit livestock to pass over Track 1619, provided such livestock paid the yardage fees which would be due in the event such stock were unloaded into the yards. The Stock Yards does not insist on unloading the livestock; it is willing to let the livestock pass, provided that cargo pays the featherbedding toll demanded. Denied the right thus to levy toll, the Stock Yards now threatens to withdraw the use of its track for all commodities.

We think that the right to withdraw, assuming it exists, does not include the right thus to condition passage. Otherwise stated, a power to discriminate is not a lesser included right within the power to withdraw altogether.[14] As long as Track 1619 is part of a railway, it must be operated as a railway, free from discrimination—which was the principal end aimed at by the Interstate Commerce Act. *New York* v. *United States*, 331 U. S. 284, 29[illegible]

But it does not follow from the assumption that the Stock Yards is free to terminate the use of Track 1619 *vis-à-vis* the New York Central that the New York Central has a similar right of abandonment *vis-à-vis* the public. Regardless of whether Spur No. 245 falls within the exception of Section 1 (22) of the Interstate Commerce Act (*infra*, p. 84), so that jurisdiction to permit abandonment is governed by the law of Ohio rather than by the Interstate Commerce Act (cf. *Texas & Pac. Ry. Co.* v. *Gulf, C. & S. F. Ry. Co.*, 270 U. S. 266; *United States* v. *Idaho*, 298 U. S. 105), it is undisputed that abandonment has not been authorized under either law, and that, in fact, there has been no abandonment. And if the rail-

[14] We think that Commissioner Splawn accordingly fell into error when he said (R. 80: 266 I. C. C. at 77), "There is an inference in the majority report, twice mentioned, that the Stock Yards Company may have the right to withdraw altogether its track from public use. If it has such authority over the track, it seems to me that it has the right to restrict its use."

road may not abandon, then, absent a satisfactory negotiation with the Stock Yards, it must condemn. It has as we have pointed out (*supra*, pp. 49, 52), ample power to do so, and it may not, as we have likewise pointed out (*supra*, p. 66), justify its continuance of discriminatory practices by establishing its inability otherwise to obtain the use of Track 1619.

It is pertinent to point out, moreover, that to permit abandonment here would open the door wide to precisely the kind of discriminatory practices which congressional legislation over a period of more than sixty years has sought to extirpate root and branch. See *New York* v. *United States*, 331 U. S. 284, 296. The present case presents a situation where the Commission, on undisputed evidence, has found violations of law—of Section 3 (1), which forbids discrimination among shippers; of Section 1 (6), which condemns unreasonable practices; and of Section 1 (9), which requires railroads to operate switch connections with private sidetracks. We demonstrated above how Section 1 (3) (a) makes ownership of any part of a railway system irrelevant to the duty imposed on the carrier to operate its railway in accordance with law; and we demonstrated further that the carrier could not by contract relieve itself of that duty. Here the proposition would be that the carrier may, by informal abandonment, relieve itself from compliance with an order of the Commission requiring performance of the

carrier's duty. If that proposition were once accepted, then obviously the Interstate Commerce Act in respect of duties under Section 1 (9) would be well-nigh nullified. Compare *Cleveland, etc., Ry.* v. *United States*, 275 U. S. 404, which holds that the exception in Section 1 (22) does not destroy the Commission's power under Section 1 (9). But, as we have already indicated, this discussion of abandonment is a digression undertaken solely for the sake of completeness. As long as the present proceeding was before the Commission, the Stock Yards never undertook to cancel the New York Central's right to use Track 1619, and the New York Central never then or since has ever suggested an abandonment of Spur No. 245.

The shipper here, Swift, connected its private track with a portion of New York Central track. That being so, it is entirely immaterial that Swift, for reasons of its own, chose not to construct a spur to connect with the New York Central's main line (R. 31; 266 I. C. C. at 58). Section 1 (9) of the Interstate Commerce Act is not limited to switch connections with main lines; it speaks of a "railroad," and that term, see Section 1 (3) (a), includes the entire system. That being so, the state of the record title to Track 1619, or the contractual arrangements respecting its operation, or the fact that there are such arrangements, is each quite as immaterial to the shipper as the circumstance that the New York Central

is lessee rather than fee owner of the Big Four system, or that there are three, two, one or no mortgages on that system, or that the appellee Erie Railroad Company was in reorganization proceedings (see R. 179) while this proceeding was before the Commission, or that a portion of the New York Central's track fifty miles distant from the Cleveland stockyard district is subject to a possibility of reverter in the undetermined heirs of some local worthy now deceased. The shipper's concern ends when it has built the private siding to the railroad's line. *Cleveland, Etc., Ry.* v. *United States*, 275 U .S. 404. Thereafter, the railroad must build the switch, and, once that is done, both carrier and shipper are subject to the provisions of the Interstate Commerce Act. Swift here is no more bound to look to the title to Track 1619, and is no more bound by knowledge of any infirmity in that title, than it is concerned with the existence of a similar arrangement anywhere along the line of the system to which its private track connects.

Nor is it material that the landowner here is "a stockyard under the provisions of the Packers and Stockyards Act" and that for over twenty-five years "it has operated under the jurisdiction of the Secretary of Agriculture" (R. 148). The Commission is not undertaking to regulate the landowner or its business *qua* landowner, it is striking down discriminatory practices engaged in by rail carriers. Its powers are not curtailed by

the circumstance that the owner of a portion of the track operated by the carrier happens to be engaged in an activity subject to regulatory supervision by another agency of government. If Track 1619 were owned by a broadcasting company, subject to regulation only by the Federal Communications Commission, and that company imposed a discriminatory rate on newspapers passing over the track, the Interstate Commerce Commission's power would not be curtailed. For the latter Commission deals only with transportation, and its order in the present case concerned only the nondiscriminatory transportation of a particular commodity to a shipper whose private track had been connected for over a generation to the system of a common carrier by rail.

The Commission's order here under scrutiny merely requires that the carriers cease and desist from the violations of the Interstate Commerce Act which the Commission found to exist. The carriers are free to perform their obligations in any appropriate manner that they see fit. They are also at liberty to relieve themselves from their obligations to serve Swift and other industries connected through Track 1619 by taking proper steps legally to abandon the operation of that portion of the railroad system. But until such formal abandonment the Commission's order requires that the transportation service be furnished without discrimination or other specified

violations of applicable provisions of the Interstate Commerce Act.

Whatever may be the practical compulsion on the carrier to use Track 1619 belonging to the Stock Yard in order to carry out its common carrier obligations to the public, the Commission's order does not constitute an appropriation of Stock Yards' property. *A fortiori* it is not an appropriation of Stock Yards' property for the private use of Swift, as the court below held.

Consequently, it is submitted that whatever may be the right of the Stock Yards to fair, adequate, and just compensation for the use of its land, that right has no bearing upon the validity of the Commission's order. The Commission's order effects no unconstitutional taking of property from the Stock Yards; it merely requires the railroads to perform their duties to the public as common carriers. It is the responsibility of the New York Central to take such steps as may be necessary to enable it to furnish the service it is required to perform. Swift and other affected shippers are not concerned with any bargain the railroad may see fit to make with the Stock Yards. Whatever claims the Stock Yards may see fit to assert, in order to secure just compensation in the absence of agreement, may be presented for appropriate consideration in a suitable forum. Such claims were not determined in the adjudication made by the Commission in the order involved in the case at bar.

It necessarily follows that the Commission's order which requires the railroads to perform their duties to the public as common carriers by making direct delivery of livestock to the Swift sidetrack and by desisting from the violations of Sections 3 (1), 1 (6), and 1 (9) which were found by the Commission to exist, is valid, and that it should not have been set aside.

CONCLUSION

The ruling of the district court sanctions the continued enforcement of a private contractual arrangement which obstructs the free flow of interstate commerce by the levy of a discriminatory toll on a single commodity. The judgment of the district court should therefore be reversed, with directions to dismiss the complaints.

Respectfully submitted.

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APPENDIX A

Pertinent Statutory Provisions

1. National transportation policy (act of sept. 18, 1940, 54 stat. 898)

It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

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2. INTERSTATE COMMERCE ACT, AS AMENDED, PART I (40 U. S. C. 1, ET SEQ.).

SEC. 1. (1) That the provisions of this part shall apply to common carriers engaged in—

(a) The transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment; or

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(3) (a) The term "common carrier" as used in this part shall include all pipe-line companies; express companies; sleeping-car companies; and all persons, natural or artificial, engaged in such transportation as aforesaid as common carriers for hire. Wherever the word "carrier" is used in this part it shall be held to mean "common carrier". The term "railroad" as used in this part shall include all bridges, car floats, lighters, and ferries used by or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, including all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property. The term "transportation" as used in this part shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied,

for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported. The term "person" as used in this part includes an individual, firm, copartnership, corporation, company, association, or joint-stock association; and includes a trustee, receiver, assignee, or personal representative thereof.

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(4) It shall be the duty of every common carrier subject to this part to provide and furnish transportation upon reasonable request therefor, and to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto; and it shall be the duty of common carriers by railroad subject to this part to establish reasonable through routes with common carriers by water subject to part III, and just and reasonable rates, fares, charges, and classifications applicable thereto. It shall be the duty of every such common carrier establishing through routes to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such participating carriers.

(5) (a) All charges made for any service rendered or to be rendered in the transportation of

passengers or property, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful.

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(6) It is hereby made the duty of all common carriers subject to the provisions of this part to establish, observe, and enforce just and reasonable classifications of property for transportation, with reference to which rates, tariffs, regulations, or practices are or may be made or prescribed, and just and reasonable regulations and practices affecting classifications, rates, or tariffs, the issuance, form, and substance of tickets, receipts, and bills of lading, the manner and method of presenting, marking, packing, and delivering property for transportation, the facilities for transportation, the carrying of personal, sample, and excess baggage, and all other matters relating to or connected with the receiving, handling, transporting, storing, and delivery of property subject to the provisions of this part which may be necessary or proper to secure the safe and prompt receipt, handling, transportation, and delivery of property subject to the provisions of this part upon just and reasonable terms, and every unjust and unreasonable classification, regulation, and practice is prohibited and declared to be unlawful.

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(9) Any common carrier subject to the provisions of this part, upon application of any lateral, branch line of railroad, or of any shipper tendering interstate traffic for transportation, shall

construct, maintain, and operate upon reasonable terms a switch connection with any such lateral, branch line of railroad, or private side track which may be constructed to connect with its railroad, where such connection is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same; and shall furnish cars for the movement of such traffic to the best of its ability without discrimination in favor of or against any such shipper. If any common carrier shall fail to install and operate any such switch or connection as aforesaid, on application therefor in writing by any shipper or owner of such lateral, branch line of railroad, such shipper or owner of such lateral, branch line of railroad may make complaint to the Commission, as provided in section thirteen of this part, and the Commission shall hear and investigate the same and shall determine as to the safety and practicability thereof and justification and reasonable compensation therefor, and the Commission may make an order, as provided in section fifteen of this part, directing the common carrier to comply with the provisions of this section in accordance with such order, and such order shall be enforced as hereinafter provided for the enforcement of all other orders by the Commission, other than orders for the payment of money.

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(18) After ninety days after this paragraph takes effect no carrier by railroad subject to this part shall undertake the extension of its line of railroad, or the construction of a new line of rail-

road, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this part over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this part shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment. Nothing in this paragraph or in section 5 shall be considered to prohibit the making of contracts between carriers by railroad subject to this part, without the approval of the Commission, for the joint ownership or joint use of spur, industrial, team, switching, or sidetracks.

(19) The application for and issuance of any such certificate shall be under such rules and regulations as to hearings and other matters as the Commission may from time to time prescribe, and the provisions of this part shall apply to all such proceedings. Upon receipt of any application for such certificate the Commission shall cause notice thereof to be given to and a copy filed with the governor of each State in which such additional or extended line of railroad is proposed to be constructed or operated, or all or any portion of a line of railroad, or the operation thereof, is proposed to be abandoned, with the right to be

heard as hereinafter provided with respect to the hearing of complaints or the issuance of securities; and said notice shall also be published for three consecutive weeks in some newspaper of general circulation in each county in or through which said line of railroad is constructed or operates.

(20) The Commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. From and after issuance of such certificate, and not before, the carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation, or abandonment covered thereby. Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, or any party in interest; and any carrier which, or any director, officer, receiver, operating trustee, lessee, agent, or person, acting for or employed by such carrier, who knowingly authorizes, consents to, or permits any violation of the provisions of this paragraph or of paragraph (18) of this section, shall upon

conviction thereof be punished by a fine of not more than $5,000 or by imprisonment for not more than three years, or both.

(21) The Commission may, after hearing, in a proceeding upon complaint or upon its own initiative without complaint, authorize or require by order any carrier by railroad subject to this part, party to such proceeding, to provide itself with safe and adequate facilites for performing as a common carrier its car service as that term is used in this part, and to extend its line or lines: *Provided,* That no such authorization or order shall be made unless the Commission finds, as to such extension, that it is reasonably required in the interest of public convenience and necessity, or as to such extension or facilities that the expense involved therein will not impair the ability of the carrier to perform its duty to the public. Any carrier subject to this part which refuses or neglects to comply with any order of the Commission made in pursuance of this paragraph shall be liable to a penalty of $100 for each day during which such refusal or neglect continues, which shall accrue to the United States and may be recovered in a civil action brought by the United States.

(22) The authority of the Commission conferred by paragraphs (18) to (21), both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching or side tracks, located or to be located wholly within one State, or of street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation.

SEC. 2. That if any common carrier subject to the provisions of this part shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this part, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.

SEC. 3. (1) It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

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SEC. 6. (7) No carrier, unless otherwise provided by this part, shall engage or participate in the transportation of passengers or property, as defined in this part, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this part; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs.

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SEC. 12. (1) The Commission shall have authority, in order to perform the duties and carry out the objects for which it was created, to inquire into and report on the management of the business of all common carriers subject to the provisions of this part, and to inquire into and report on the management of the business of persons controlling, controlled by, or under a common control with, such carriers, to the extent that the business of such persons is related to the management of the business of one or more such carriers, and the Commission shall keep itself informed as to the manner and method in

which the same are conducted. The Commission may obtain from such carriers and persons such information as the Commission deems necessary to carry out the provisions of this part; and may transmit to Congress from time to time such recommendations (including recommendations as to additional legislation) as the Commission may deem necessary. The Commission is hereby authorized and required to execute and enforce the provisions of this part; and, upon the request of the Commission, it shall be the duty of any district attorney of the United States to whom the Commission may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States all necessary proceedings for the enforcement of the provisions of this part and for the punishment of all violations thereof, and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States; and for the purposes of this part the Commission shall have power to require, by subpoena, the attendance and testimony of witnesses and the production of all books, papers, tariffs, contracts, agreements, and documents relating to any matter under investigation.

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SEC. 15. (1) That whenever, after full hearing, upon a complaint made as provided in section 13 of this part, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of

opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this part for the transportation of persons or property as defined in the first section of this part, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this part, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this part, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

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(13) If the owner of property transported under this part directly or indirectly ren-

ders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be published in tariffs or schedules filed in the manner provided in this part and shall be no more than is just and reasonable; and the Commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for under this section.

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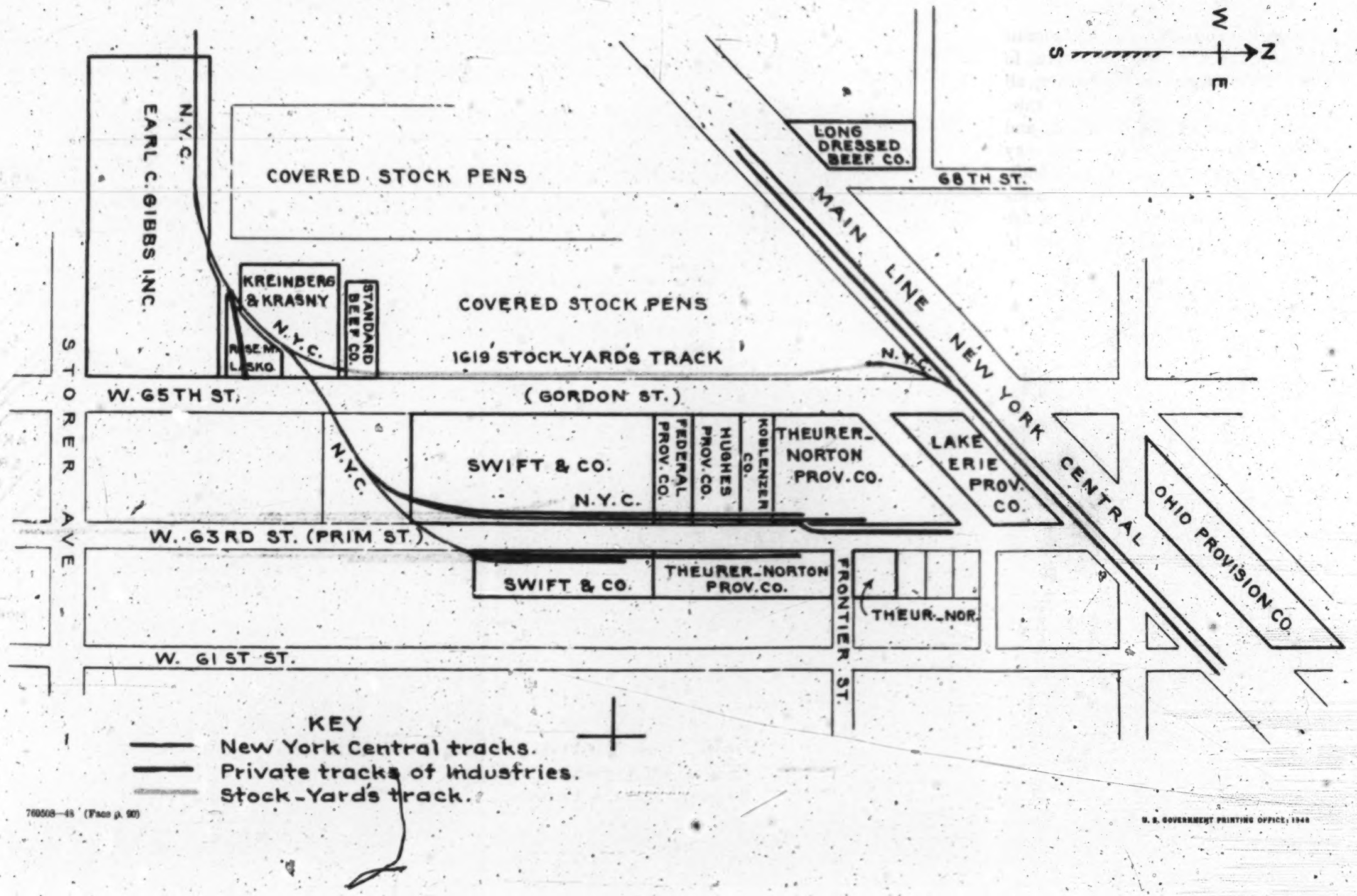
SEC. 16. (7) It shall be the duty of every common carrier, its agents and employees, to observe and comply with such orders so long as the same shall remain in effect.

(8) Any carrier, any officer, representative, or agent of a carrier, or any receiver, trustee, lessee, or agent of either of them, who knowingly fails or neglects to obey any order made under the provisions of sections 3, 13, or 15 of this part shall forfeit to the United States the sum of $5,000 for each offense. Every distinct violation shall be a separate offense, and in case of a continuing violation each day shall be deemed a separate offense.

3. SECTION 2 OF THE ELKINS ACT (49 U. S. C. 42)

That in any proceeding for the enforcement of the provisions of the statutes relating to interstate commerce, whether such proceedings be instituted before the Interstate Commerce Com-

mission or be begun originally in any circuit court of the United States, it shall be lawful to include as parties, in addition to the carrier, all persons interested in or affected by the rate, regulation, or practice under consideration, and inquiries, investigations, orders, and decrees may be made with reference to and against such additional parties in the same manner, to the same extent, and subject to the same provisions as are or shall be authorized by law with respect to carriers.



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